92-1119

No. _____

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In the Supreme Court of the United States

October Term, 1992

DUANE WENDALL LARSON, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS ERRED WHEN IT ALLOWED TO STAND THE DISTRICT COURT'S DENIAL OF A MOTION FOR RECONSIDERATION OF PETITIONER'S 28 USC 2255 WRIT DISMISSAL WHERE THAT SAME DISTRICT COURT HAD PREVIOUSLY REVERSED THE FACTUAL FINDING OF THE DISMISSAL ORDER THEREBY EVISCERATING BOTH THE FACTUAL FINDING AND LEGAL CONCLUSIONS OF THE DISMISSAL AND WHERE PETITIONER HAD PRESENTED STRONG FACTUAL ALLEGATIONS THAT THE CONVICTION WAS IN VIOLATION OF THE 4TH AMENDMENT, AND WHERE MACHIBRODA V. U.S., 368 U.S. 487 (1962); KAUFMAN V. U.S., 394 U.S. 217 (1969); AND 28 USC 2255 REQUIRE AN EVIDENTIARY HEARING, UNLESS THE RECORD IS CLEAR, BUT WHERE PETITIONER HAS BEEN DENIED AN EVIDENTIARY HEARING, THE RECORD IS NOT CLEAR, AND THE GOVERNMENT HAS NEVER PROVIDED AN ANSWER WHICH RESPONDS TO PETITIONER'S FACTUAL ALLEGATIONS.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Petition 1

Opinions Below 2-3

Jurisdiction 3

Statement 4-18

Reason for Granting the Writ 18-41

Conclusion 41-45

Appendix - Seperate Booklet

TABLE OF AUTHORITIES

SUPREME COURT:

Arkansas v. Sanders,
442 U.S. 753 (1979) 8

Florida v. Jimeno,
500 U.S. (1991) 33

Kaufman v. U.S.,
394 U.S. 217 (1969) 18, 24, 36

Machibroda v. U.S.,
368 U.S. 487 (1962) 18, 24, 30

Smith v. Ohio,
494 U.S. 451 (1990) 26, 38

Stone v. Powell,
428 U.S. 465 (1976) 11

Texas v. Brown,
460 U.S. 730 (1983) 9, 33

U.S. v. Chadwick,
433 U.S. 1 (1977) 8

U.S. v. Jacobson,
466 U.S. 109 (1984) 15

U.S. v. Ross,
456 U.S. 798 (1982) 38

U.S. v. Schlies,
433 U.S. 905 (1977) 9

APPEALS COURT:

Baily v. Oliver,
695 F.2d 1323 (11th Cir.1983) . . 38

Byrd v. Delo,
917 F.2d 1037 (8th Cir.1990) . . 38

Gray v. Estelle,
574 F.2d 209 (5th Cir. 1978) . . 40

Larson v. U.S.,
833 F.2d 758 (8th Cir.1987) . . . 2, 14, 17, 26

Larson v. U.S.,
905 F.2d 218 (8th Cir. 1990) . . 2, 16, 19, 36

Matter of Emec. Bea. Co.,
666 F.2d 754 (2nd Cir.1981) . . . 39

U.S. v. Donn, 661 F.2d 820
(9th Cir.1981) 38

U.S. v. Edwards, 711 F.2d 633
(5th Cir. 1983) 31

U.S. v. Johnson, 707 F.2D 317
(8th Cir. 1983) 14

U.S. v. Larson, 760 F.2d 852
(8th Cir. 1985) 3, 8, 9, 17, 32

U.S. v. Mefford, 658 F.2d 588
(8th Cir. 1981) 12, 26, 38

U.S. v. Moore, 943 F.2d 884
(8th Cir. 1991) 26

U.S. v. Parizo, 514 F.2d 52
(2nd Cir. 1975) 10

U.S. v. Schlies, 582 F.2d 1166
(8th Cir. 1978) 9

Willwording v. Swenson, 502 F.2d 844 (8th Cir.1974) 30

OTHER AUTHORITIES:

Sanger v. Wainwright, 605 F. Supp. 686 (M.D. Fla.1985) 38

Quevedo v. Postmaster, 774 F. Supp. 837 (S.D.N.Y/1991) 39

U.S. Constitution, Fourth Amendment 3

U.S. Constitution, Fifth Amendment 4

21 USC 841 7

28 USC 1254(1) 3

28 USC 1291 18

28 USC 2101(c) 3

28 USC 2243 25

28 USC 2254 25

28 USC 2255 and Rules 5 and 9 -Throughout

Supreme Court Rule 13.1 3

Supreme Court Rule 14.1 (K) (iv) 2

Supreme Court Rule 20.1 42

E.D.N.C.R. Local Rule 17(B) . . . 25

F.R.Civ.P. Rule 52(a) 31

F.R.Civ.P. Rule 60(b)(6) 39, 40

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DUANE WENDALL LARSON

PETITIONER

V.

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The petitioner, Duane Wendall Larson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on October 8, 1992, and the order of the United States Court of Appeals

for the Eighth Circuit, entered on November 16, 1992 denying the petition for rehearing with suggestion for rehearing en banc.

OPINIONS BELOW

The opinion of the court of appeals, Larson v. U.S., is unreported and is reproduced in the appendix hereto at pp. 1 through 3. The order of denial of rehearing and rehearing en banc appears at p. 4. The order affirming the judgement was entered the same day as the opinion and is not reproduced in accord with Supreme Court rule 14.1(k)(iv). The district court's order of March 10, 1992 is reproduced at 5-9; the report and recommendation of December 23, 1991 at 10-37; the opinion of the 8th Circuit Court of Appeals, Larson v. U.S., 905 F.2d 218 (1990) at 38-51; the district court order of February 23, 1989 at 52-53; the report and recommendation of January 13, 1989 at 54-85; the opinion of the 8th Circuit Court of Appeals, Larson v. U.S., 833 F.2d 758

(1987) at 86-91; the district court order of July 2, 1987 at 92-116; and the report and recommendation of April 17, 1987 at 117-168; and the opinion of the 8th Circuit Court of Appeals, U.S. v. Larson, 760 F.2d 852 (1985) at 169-191.

JURISDICTION

The judgement of the Court of Appeals for the Eighth Circuit was entered on October 8, 1992. A timely petition for rehearing en banc was denied on November 16, 1992. Title 28 USC 2101(c) and Supreme Court Rule 13.1 permit filing a petition for writ of certiorari in civil cases within ninety days of the entry of judgement by the Court of Appeals. This petition is timely because it was filed within that period. This court's jurisdiction is invoked under 28 USC 1254(1). The relevant constitutional provisions in this petition are the 4th amendment to the U.S. Constitution which

states: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." ; and the Due Process clause of the 5th amendment to the U.S. Constitution which provides that: "No person shall...be deprived of ....liberty... without due process of law..".

STATEMENT

This petition concerns the denial of Petitioner's motion to reconsider a 28 USC 2255 Petition to vacate his conviction where that 28 USC 2255 petition was dismissed based upon factual findings and legal conclusions made by the United States District Court in 1987. The same judge, however, found in 1989 that her original factual findings and legal conclusions of

1987 had been in error. In 1991 Petitioner then asked the district court to reconsider the 1987 order dismissing the 28 USC 2255 petition because it no longer was based upon a factual finding nor did it provide any legal conclusion. The district court dismissed the motion to reconsider as successive per 28 USC 2255 Rule 9 and as untimely per F. R. Civ. P. Rule 60(b). The 8th circuit affirmed. The foundational facts follow.

On October 29, 1983 Petitioner left his Howard Johnson's motel room in Burnsville, Minnesota for approximately one hour. While he was out the motel manager came to the room at 5:45 P.M. to seek payment for phone calls. Since there was no answer at the door the manager entered the room and found two clear plastic bags containing lactose and mannitol, inside open-topped brown paper grocery bags, which he mistakenly believed to be cocaine. The manager left the room and called the

police. In the meantime Petitioner returned to the room with five sealed containers of real cocaine. Shortly after Petitioner returned to the room the Burnsville police arrived and informed Petitioner they wished to search the room. Petitioner refused permission, but the motel manager gave permission to search the room. The police then searched the room and all items therein, which included the opening of Petitioner's five closed containers, finding both the bags of non-narcotic that the manager had seen earlier, and the real cocaine. The search was done without a search warrant.

The trial record shows the cocaine was found in two different places in the motel room by the police. On the sink in the bathroom, in a brown paper bag, were three manila envelopes. Each standard manila envelope had a metal clasp for closing and inside were plastic bags containing cocaine. These were exhibits 1, 2, and 3

holding, 500, 125, and 250 grams of cocaine respectively. At the other end of the room was a brown paper bag under the television set. Inside that bag was another brown paper bag containing 500 grams of cocaine inside a plastic bag (exhibit 4) and another smaller brown paper bag containing yet another brown paper bag and inside that was 10.2 grams of cocaine contained inside a plastic bag (exhibit 9). Exhibit 5, 6, and 7 were plastic bags of non-narcotic mannitol and lactose containing 2028, 2378, and 219 grams respectively and were found in different brown paper bags on the bed. These were the bags seen by the motel manager earlier.

Petitioner was indicted for cocaine possession with intent to distribute in violation of 21 USC 841. Prior to trial Petitioner's attorneys moved to suppress the evidence on Fourth Amendment grounds. Their motion to suppress raised only the issue that Petitioner continued to have a

privacy interest in the motel room after the rental period had expired. The District Court denied suppression. Petitioner was convicted by jury verdict on February 9, 1984 and was sentenced to ten years imprisonment on May 2, 1984. The conviction was affirmed in United States v. Larson, 760 F.2d 852 (8th Cir. 1985). Petitioner's attorneys did not explain to either the district court nor the court of appeals that the manager had seen only non-narcotic sugar-based substances, nor that Petitioner's cocaine was concealed inside closed containers. Petitioner was sent to prison on June 25, 1985 where in 1986 he learned that his attorneys had been ineffective because they had not moved to suppress the cocaine which had been concealed from view inside closed containers and these containers each possessed their own reasonable expectation of privacy per U.S. v. Chadwick, 433 U.S. 1 (1977); Arkansas v. Sanders, 442 U.S. 753

(1979); Texas v. Brown, 460 U.S. 730 (1983); and U.S. v. Schlies, 582 F2d 1166 (8th Cir. 1978) (en banc) on remand from the U.S. Supreme Court; U.S. v. Schlies, 433 U.S. 905 (1977). (Schlies also involved the Burnsville, MN, police department).

In early 1986 Petitioner filed a petition to vacate the conviction on 28 USC 2255 motion which alleged the cocaine was concealed from view inside their own containers.

The government's response did not discuss the facts in any manner whatsoever, but rather (incorrectly) alleged the fourth amendment container issue could not be raised by 28 USC 2255 in this case because the container issue had already been decided on direct appeal by the Eighth Circuit in U.S. v. Larson, 760 F.2d 852 (1985). See government response of August 20, 1986 at relevant pp. 2-5 exhibited in the appendix at pp. 191-195. The government incorrectly asserted at p. 3

that the Eighth Circuit had found "(n)either Larson not his belongings were, therefore, protected under the fourth amendment." However, the Eighth Circuit did not find petitioner had lost an expectation of privacy in his personal belongings, but rather only in the motel room. The government incorrectly stated that the Eighth Circuit had cited U.S. v. Parizo, 514 F.2d 52, 54 (Second Circuit 1975) for proposition that "the motel manager has the right to...consent to the search...of items found in the room." However, Parizo actually says the manager "may consent to a search of the room and seizure of the items found there" p.54. The cases cited by the government do not apply to the container issue at all, but rather only to the room issue. Unlike those cases cited petitioner was significantly present and actively asserting his fourth amendment rights over his containers. Next, at p. 4 the

government appears to have made the same error that the district court has since conceded it also made, see infra. That is, the government believed "the cocaine was in open grocery bags as evidenced by...the motel personnel...before the police arrived." It is now known that the manager did not see cocaine at all, see infra. Consequently, the government did not address petitioner's factual allegations, choosing instead to simply recite the cause of detention and repeat the finding of the Eighth Circuit, despite the requirements of 28 USC 2255 Rule 5. There was no evidentiary hearing held.

Magistrate Boline's report and recommendation of 1987 recommended various procedural bars, such as it wouldn't be fair for Petitioner as a federal prisoner to vacate his conviction on fourth Amendment grounds when under Stone v. Powell, 428 U.S. 465, state prisoners cannot do so; and it was Petitioner's fault

that his attorney didn't know "the cocaine was concealed inside sealed envelopes" (R&R at p. 21). Consequently Petitioner's objections to the report and recommendation did not discuss the, apparently conceded, facts but rather discussed only procedural bars, and the fact that Petitioner had informed his attorneys of the sealed containers. The district court, however, surprised Petitioner when it sua sponte, and unexpectantly, made a "this court is familiar with the facts factual finding", based solely on the record, without an appropriate answer from the government per 28 USC 2255 Rule 5, and without an evidentiary hearing, that the cocaine was in plain view when found by the motel manager. See July 2, 1987 order p. 5 n. 3, p. 7, and p. 11. The court also found there was no reasonable expectation of privacy in Petitioner's paper bags based upon U.S. v. Mefford, 658 F2d 588, (8th Cir. 1981). The end result was that

Petitioner's 2255 petition was decided by the court entirely upon the existing record and without an evidentiary hearing.

The court found the motel manager had seen cocaine in plain view thereby setting the ground for a police expansion of a private search. The report and recommendation as adopted by U.S. Judge Murphy on July 2, 1987 also stated at p.21 "If Attorney Smith was unaware until midway through the trial that the cocaine was concealed inside sealed envelopes, his ignorance can be attributed to Larson..." (The adoption resulted in conflicting signals. Magistrate Boline believed the cocaine was concealed but he found that it would have been unfair to vacate the conviction for Petitioner, a federal prisoner, when a state prisoner cannot vacate a fourth amendment issue on collateral attack. The court added the above factual finding but adopted the report and recommendation. The appeals

court, Larson v. U. S., 833 F.2d 758 (8th Cir. 1987), rejected the fairness finding and found but for the expansion of a private search finding counsel would have been ineffective if the cocaine could have been suppressed pre-trial; citing U.S. v. Johnson, 707 F2d 317, 320, 323 (8th Cir. 1983).

On August 30, 1988, Petitioner filed a second 28 U.S.C. 2255 alleging that the 1st writ finding had been factually incorrect because the factual finding by the district court that the motel manager had seen cocaine had been in error.

The government's response did not challenge nor deny Petitioner's factual allegations, instead, once again it argued only procedural bar, this time per Rule 9(b). There again was no evidentiary hearing but on January 13, 1989, Magistrate Becker's Report and Recommendation found:

"Petitioner's allegations as to what the hotel manager saw in his private

search of the hotel does not differ in a material way with the testimony at trial...there was no evidence at trial that what the hotel manager saw was indeed cocaine. To the contrary, the hotel manager's description at trial of the two plastic bags filled with white powder comports with Officer Clark Holden's description...which were later identified as sugar-based substances...Thus, what this discussion proves is that a private search could not support the police search under either the evidence adduced at trial or the new facts put forth by Petitioner. On the facts, the private search was simply too limited in scope to legitimize the scope of the police search. See United States v. Jacobson, 466 U.S. 109 (1984)." R&R pp. 13-14.

The magistrate concluded, however, that regardless of what the motel manager had

seen, the district court found in 1987 that there was plain view so the conviction should stand. Judge Murphy again adopted the R&R, dismissed the writ, and Petitioner appealed. The Eighth Circuit thereafter found the district court had erred procedurally to have even considered the second writ since the first writ finding was still in place. See Larson v. United States, 905 F.2d 218, 221 (8th Cir. 1990)

After the Eighth Circuit reversed the district court and dismissed Petitioner's appeal it forced the focus back to the first writ's now eviscerated factual and legal findings and also focused the fact that when the district court self-reversed its expansion of a private search finding, the district court admitted it was not familiar with the facts of this case afterall (or else it would not have erringly found the manager had seen cocaine). Petitioner then filed a combination Motion for Reconsideration of

the first writ finding/3rd 2255 petition which Magistrate Boline recommended on December 23, 1991 be summarily dismissed as abusive and successive. Petitioner objected to the report and recommendation. The district court again adopted the R&R on March 10, 1992, but added to its order the proposition that Petitioner's attorneys could not have been ineffective at trial because Petitioner had followed attorney Goodman's advice at trial and refused to let standby counsel put on a defense. This finding was previously set forth in J. Murphy's order of 1987 but was rejected in Larson, 833 F2d 758, 759 citing Johnson, supra, (failure to suppress suppressible evidence pre-trial shows lack of diligence). Compare also Larson, 760 F2d at 856-7 (lack of diligence by Petitioner's defense team).

The Eighth Circuit affirmed the denial of the Motion to Reconsider on October 8, 1992, and the rehearing request was denied

on November 16, 1992.

The district court's jurisdiction was founded in 28 USC 2255. The Court of Appeals' jurisdiction was found in 28 USC 1291.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS ERRED WHEN IT ALLOWED TO STAND THE DISTRICT COURT'S DENIAL OF A MOTION FOR RECONSIDERATION OF PETITIONER'S 28 USC 2255 WRIT DISMISSAL WHERE THAT SAME DISTRICT COURT HAD PREVIOUSLY REVERSED THE ORIGINAL FACTUAL FINDING OF THE DISMISSAL ORDER THEREBY EVISCERATING BOTH THE FACTUAL FINDING AND LEGAL CONCLUSIONS OF THE DISMISSAL AND WHERE PETITIONER HAD PRESENTED STRONG FACTUAL ALLEGATIONS THAT THE CONVICTION WAS IN VIOLATION OF THE 4TH AMENDMENT, AND WHERE MACHIBRODA V. U.S., 368 U.S. 487 (1962); KAUFMAN V. U.S., 394 U.S. 217 (1969); AND 28 USC 2255 REQUIRE AN EVIDENTIARY HEARING, UNLESS THE RECORD IS CLEAR, BUT WHERE PETITIONER HAS BEEN DENIED

AN EVIDENTIARY HEARING, THE RECORD IS NOT CLEAR, AND THE GOVERNMENT HAS NEVER PROVIDED AN ANSWER WHICH RESPONDS TO PETITIONER'S FACTUAL ALLEGATIONS.

This case is about due process, substantial justice, and fair play. This case has never had any type of evidentiary hearing, nor has the government ever addressed petitioner's factual allegations, nor has this case ever been orally argued on the merits, nor on the law, in any court. Petitioner has repeatedly been deprived of his right to a full and fair opportunity to be heard. (There was oral argument in the 8th Cir. in 1990, however, that court did not reach the merits, nor the law, but instead reversed the district court on other grounds in Larson v. U.S., 905 F.2d 218 (8th Cir. 1990) which mooted petitioner's oral argument on the merits. The court found the district court had procedurally erred per 28 USC 2255 Rule 9 when it failed to summarily dismiss

petitioner's second writ as successive.) Petitioner seeks here only the most basic fundamental requirements of habeas corpus law: 1.) an answer from the government consistent with 28 USC 2255 Rule 5; and 2.) if the government should dispute petitioner's factual allegations, then petitioner seeks an evidentiary hearing. Petitioner is entitled to as much yet he has been deprived of these simple requirements of due process below.

The issue in this case is complicated inasmuch as the government has basically never been involved in the case and petitioner has literally been litigating with the district court. The government has <u>never</u> taken a position on petitioner's factual allegations in any manner whatsoever. Petitioner has filed numerous motions with the district court asking the court to order the government to comply with 28 USC 2255 Rule 5 but the court has refused to do this. Consequently, the

findings of the court have been made without the benefit of adversarial input. The district court, nevertheless, made a factual finding in 1987, but that factual finding was then reversed by the same district court in 1989. Petitioner then filed a motion for reconsideration of the first finding. The district court, however, dismissed petitioner's motion for reconsideration by citing back to the finding from 1987 and dismissing the motion as if it were a successive writ per 28 USC 2255 Rule 9 without acknowledging the self-reversal of the facts in that finding. This circular reasoning has resulted in circular law which tragically maintains an illegal conviction. The simple fact is the court's order from 1987 <u>does</u> <u>not</u> say the police saw cocaine in plain view. It only says the motel manager saw cocaine. This can be quickly and easily verified by looking at the July 2, 1987 order at p.5 n.3, p.7, and p.11. Even if the order had

said the police saw cocaine in plain view it would be clearly erroneous since there is no support for such a finding in the record, BUT THE ORDER DOES NOT SAY THE POLICE FOUND COCAINE IN PLAIN VIEW, it only says the motel manager saw cocaine in plain view. The relevant parts of that order in their entirety are as follows:

P. 5, n.3; "The trial testimony revealed that when the hotel manager looked into the grocery bags, he saw plastic bags inside, filled with white powder. Not all the plastic bags were in manila envelopes, and the tops of some of the grocery bags were open. Pretrial Transcript (P.T.) (Vol.) I: 62-3, 134,. Trial Transcript (T.T.) II: 307-8, 312, 336, 351, 373."

P. 7; "Even if the court were to reach the merits of the container issue, the record indicates at least some of the cocaine was in plain view rather than in closed and opaque container (sic). See supra note 3."

P.11; "The testimony at trial was that not all the cocaine was contained in opaque packaging and at least some of the cocaine was visible to the hotel manager when he looked around the room. See supra note 3."

This finding discusses only what the motel manager saw. The white powder discussed at p.5 n.3 was not cocaine. This was decided to be a sugar-based substance by the same district court judge on February 23, 1989 when she adopted pp. 13-14 of the report and recommendation of January 13, 1989. All references to plain view in the order refer back to p.5 n.3, but it is now known that p.5 n.3 refers to sugar-based substances not cocaine. The conviction in this case is no longer grounded in any finding of fact whatsoever because any factual finding that the motel manager saw cocaine in plain view was vacated in 1989 thereby eviscerating the legal conclusions of the order of July 7, 1992. There has never been a evidentiary

hearing on what the police saw in plain view in this case despite petitioner's numerous requests for one. There simply is no support whatsoever in the record to say the police saw cocaine in plain view, nor does the court's order of July 2, 1987 say the police saw cocaine in plain view.

The law says where the record does not clearly show that petitioner is entitled to no relief an evidentiary hearing is required. Machibroda v. U.S., 368 U.S. 487 (1962); Kaufman v. U.S., 394 U.S. 217 (1969). Yet the district court refuses to allow one. Additionally, the government has never taken a position on the facts, not even in the first writ. The reason for this appears to be because the government knew if it disputed petitioner's factual allegations an evidentiary hearing would be required. Machibroda v. U.S., 368 U.S. 487, 494, 7 LEd.2d 473, 478-9 (1962). Consequently, it prudently avoided taking any position whatsoever on the facts,

instead pleading only procedural bars of first one type and then another. This is in direct violation of 28 USC Rule 5. See Advisory Committee Note for Rule 5 of 28 USC 2254 which states:

"The answer must respond to the allegations of the petition. While some districts require this by local rule (see, e.g., E.D.N.C.R. 17(B)), under 28 USC sec. 2243 little specificity is demanded. As a result, courts occasionally receive answers which contain only a statement certifying the true cause of detention, or a series of delaying motions such as motions to dismiss. The requirement of the proposed rule that the "answer shall respond to the allegations of the petition" is intended to ensure that a responsive pleading will be filed and thus the functions of the answer fully served."

The first writ was denied due to the expansion of a private search exception ruling and was based entirely upon the factual finding that the motel manager had

seen cocaine. The court also relied upon U. S. v Mefford, 658 F.2d 588 (8th Cir. 1981) to say paper bags have no reasonable expectation of privacy unless stapled, tied, or taped which was bad law at the time. Nevertheless, this was affirmed at Larson v U. S., 833 F.2d at 759 (8th Cir. 1987). But see Smith v Ohio, 494 U.S. 451, (1990) (Paper bags do have a reasonable exception of privacy). Yet the district court thereafter found in 1989 that the manager did not see cocaine afterall!! See Magistrate Becker's report and recommendation of January 13, 1989 at pp.13-14 as adopted by the same district court. There can be no expansion of a private search without first a private search. See U.S. v Moore, 943 F.2d 884 (8th Cir. 1991). The 1987 order does not say the police found cocaine in plain view and there is no support whatsoever in the record to say the police found cocaine in plain view. Consequently there is no

factual finding for this conviction to attach to. The record in fact says the police found only plastic bags of sugar-based substances in plain view inside open-topped brown paper grocery bags, but the record also says the cocaine was concealed inside opaque sealed containers. There is no support in the record for any finding that the police saw cocaine in plain view, even if the court order of 1987 had said they did; but the order does not say the police saw cocaine in plain view. It only says the manager saw cocaine in plain view, which the court itself has since acknowledged was in error. For the district court to rely on this acknowledged erroneous finding from 1987 in order to dismiss petitioner's motion for reconsideration is circular reasoning. Further, in view of the court's acknowledged unfamiliarity with the facts and the record, for the district court to refuse to order the government to answer

petitioner's factual allegations and still deny petitioner an evidentiary hearing when the law clearly says he is entitled to both is an abuse of discretion. Additionally, for the court to rely upon a factual finding which does not exist, and which would be clearly erroneous if it did exist, is also an abuse of discretion.

Petitioner has served all of the time for this conviction and is currently a law student in California. Petitioner is simply asking for a full and fair opportunity to be heard. Petitioner has never been given a hearing on the merits nor the law. He has instead been arguing for almost seven years only for the chance to be heard. Petitioner has argued just as vehemently for an order directing the government to answer his factual allegations. Yet both requests have been denied. The law, however, says the government shall answer, and the law says petitioner is entitled to be heard.

This case is not one where the government disputed the factual allegations and there has been an evidentiary hearing whereat it was found that the facts showed petitioner was not entitled relief. This case was first decided entirely on the record and based solely on the sua sponte factual finding by the court that the manager had seen cocaine which allowed for an expansion of a private search. Then this same factual finding was reversed by the same court in a second finding, with petitioner's second writ being dismissed as successive on appeal. Seeking a reconsideration of the first finding, in view of its revision during the second writ, petitioner then filed his motion for reconsideration. That motion has been dismissed as a successive writ based on the first finding of fact. But there is no finding of fact from the first writ. That finding was vacated. Therefore there is no factual finding and the law now requires an

evidentiary hearing, or at least an answer from the government to petitioner's factual allegations. The district court's reliance upon a finding that doesn't exist in order to deprive petitioner of a chance to be heard is contrary to law and an abuse of discretion. Petitioner is entitled to more.

The issue here is an abuse of discretion which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. The district court's original dismissal is (1) no longer founded in fact nor does it contain conclusions of law; (2) the refusal to reconsider the original dismissal is based upon circular reasoning; and (3) the handling of this entire habeas has been contrary to the law of Machibroda v U.S., 368 U.S. 487 (1962), and contrary to circuit law. See Wilwording v. Swenson, 502 F.2d 844, 849 (8th Cir. 1974) ("a

decision on the merits ... means that an evidentiary hearing was held, unless it could be said that the files and records conclusively resolved the issue"). U.S. v. Edwards, 711 F.2d 633, 634 (5th Cir.1983) (District court erred in failing to set forth findings of fact and conclusions of law upon denial of 2255 motion when record did not clearly show prisoner entitled to no relief).

In reality this conviction has been upheld on a finding that does not exist and is therefore held in place solely by the will of the district court. The law does not grant district courts such power. Indeed F.R.Civ.P Rule 52(a) states "the court shall find the facts specifically and state separately its conclusions of law thereon". See also U.S. v. Edwards, 711 F.2d at 634 (Factual findings and legal conclusions required for denial of 2255 motion). The order of July 2, 1987 after its modification can not be read to state

specifically the facts which hold this conviction in place, nor is there any conclusion of law to support the order. The only law which now holds this conviction in place is 28 USC 2255 Rule 9. While the district court has an interest in finality, that interest is not outweighed by this court's interest in substantial justice and fair play. The circular reasoning used by the district court in order to make the conviction final is merely form over substance, or commonly called "spin control" when it is done by a government agency. Spin control is not appropriate for a U.S. District Court.

When the court vacated the motel manager finding it recognized that there had been no cocaine in the room when the manager was there. The cocaine came to the room <u>after</u> the manager had left but only minutes before the police arrived. Cf. <u>Larson</u>, 760 F.2d at 858 n.3. There has never been an exploration of the facts

regarding what the police saw when they arrived. Petitioner alleges the police saw closed and sealed manila envelopes inside paper bag containers, which they then opened without a search warrant. Cf. Florida v. Jimeno, 500 U.S.____, 114 L.Ed2d at 303 (1991) ("a reasonable person may be expected to know that narcotics are generally carried in some form of container."). While exigent circumstances will allow the police to seize containers suspected of containing narcotics, it is well established that a search warrant is required before the containers may be searched. Texas v. Brown, 460 U.S. 730, 749-750 (1983). Petitioner's affidavit as submitted to the district court states the following regarding the containers:

Exhibit #1 was packaged as follows: Cocaine inside three freezer size zip lock plastic bags; which were all three inside a sealed manila envelope; which was in turn inside a white plastic garbage bag; which

in turn was inside a brown paper grocery bag which was rolled closed.

Exhibit #2 was packaged as follows: Cocaine inside three freezer size zip lock plastic bags; which were all three inside a sealed manila envelope; which was then inside another paper bag rolled closed; which was in turn inside the same white plastic garbage bag as exhibits 1 and 3; which was then placed inside the same outer brown paper grocery bag as exhibits 1 and 3.

Exhibit #3 was packaged as follows: Cocaine inside two or three freezer size zip lock plastic bags; then inside a sealed manila envelope; which was in turn inside the same white plastic garbage bag as exhibits 1 and 2; which was then placed inside the same outer brown paper bag as exhibits 1 and 2.

Exhibit #4 was packaged as follows: Cocaine inside two freezer size zip lock plastic bags; then placed inside a brown

paper grocery bag which was then rolled closed and scotch taped; then placed inside another brown paper grocery bag which was rolled closed.

Exhibit #9 was packaged as follows: Cocaine inside two sandwich size zip lock bags; these placed inside a small brown paper bag which was rolled closed and in turn placed inside another small brown paper bag which was rolled closed; then this all placed inside the same large brown paper grocery bag as ex. 4.

Petitioner also produced for the district court a true copy of a warehouse daily access report from the Allstate U-Lok Storage facility in Burnsville, Minnesota, showing that petitioner entered unit #168 of that facility at 5:45 p.m., and exited it at 5:52 p.m., on October 29, 1983. Petitioner informed the court that he had left the motel room, went to this warehouse, retrieved the cocaine, and returned with it just minutes before the

police arrived. Cf. Larson, 760 F.2d at 858 n.3 ("There is no evidence as to the actual time the cocaine made its way into the motel room.") Nevertheless, the district court refused to provide an evidentiary hearing. The district court has acknowledged some of the important facts, i.e. the motel manager did not see cocaine, but used procedural form over substance to avoid an evidentiary hearing which will develop the critical facts, i.e. that the police opened the closed containers which concealed the cocaine. See Kaufman v. U.S., 394 U.S. 217, 22 L.Ed2d at 237 (1969) (review required if the material facts were not adequately developed). Petitioner has even informed the district court that the ranking police officer on the search scene in 1983, one Sgt. Schlueter, has been interviewed by petitioner's private investigator and that Sgt. Schlueter has confirmed the containers were closed when found by the

police, and that they were opened at the scene by the police. Sgt. Schlueter has stated he will so testify at an evidentiary hearing. Still the district court refuses to grant an evidentiary hearing or even to require the government to address petitioner's factual allegations.

Even if a finding of plain view could be extrapolated from the court's 1987 order, at most the order only says "at least some" cocaine was found in plain view (by the motel manager). Exhibit #9 contained only 10.2 grams of 30% pure cocaine. If this is the cocaine that the district court believes was in plain view then petitioner is entitled to a specific finding stating as much since 10.2 grs. at 30% is a misdemeanor while 3 lbs. of pure cocaine is a felony; (one which will probably keep petitioner from being admitted to the legal bar association).

Reconsideration of the first writ is also appropriate, all other reasons aside,

due to the new law of Smith v. Ohio, 494 U.S. 451 (1990) citing U.S. v. Ross, 456 U.S. 798 (1982) which shows that U.S. v. Mefford, 658 F2d 588 (8th Cir.1981) as relied upon by both the district court and the 8th Cir. in 1987, and again by Magistrate Becker in 1989, was bad law at the time. See Byrd v. Delo, 917 F.2d 1037, 1043 (8th Cir.1990) (Reconsideration is appropriate when there is newly discovered evidence, a change in the law or some other persuasive reason). See also Baily v. Oliver, 695 F.2d 1323, 1325-6 (11th Cir.1983) (Denial of earlier petition based on plain error requires entertaining a successive writ); U.S. v. Donn, 661 F.2d 820, 823-4 (9th Cir.1981)(same); Sanger v. Wainwright, 605 F. Supp. 686, 690 (M.D. Fla.1985) (Petitioner entitled to redetermination when the denial of the first petition rested on court's plain error).

Lastly, the magistrate recommended

petitioner's reconsideration motion be denied as untimely per F.R.Civ.P. Rule 60(b). However, petitioner had not filed his motion for reconsideration pursuant to Rule 60(b), but rather per 28 USC 2255 which is based upon Constitutional rights. Nevertheless, had petitioner filed per Rule 60(b) it was not untimely. Petitioner filed his motion to reconsider appropriately 9 months after the 8th circuit reversed the district court in Larson, supra, 905 F.2d 218. A reasonable time per Rule 60(b) is dependant upon the facts of the case, including the length and circumstances of the delay, and the possibility of prejudice to the opposing party. Matter of Emec. Bea. Co., 666 F.2d 754, 760 (2nd Cir.1981) (26 month delay held reasonable). Also courts may grant relief from final judgements whenever it is appropriate to accomplish justice. Quevedo v. Postmaster, 774 F. Supp. 837, 839 (S.D.N.Y.1991). There can be no prejudice

to respondent here since they are in the same position they have always been in, BUT under the circumstances there is a grave injustice taking place for petitioner. Consequently, even under Rule 60(b)(6) the motion was not untimely since a (b)(6) motion can be ruled on whenever the interests of justice call for it. Rule 60(b)(6) can be applied to habeas actions as needed. See Gray v. Estelle, 574 F.2d 209, 214-5 (5th Cir.1978).

Be all of this as it may, the main difference is that petitioner sought reconsideration of an order dismissing his motion to vacate the conviction as filed per 28 USC 2255. He did not file a motion seeking relief from a judgement per Rule 60(b) years after the judgement had become final. Petitioner had been actively seeking to vacate this conviction through habeas since 1986. Rule 60(b) does not apply here. It was simply bootstrapped in by the magistrate in order to deny an

evidentiary hearing.

CONCLUSION

If district courts are allowed to handle serious matters such as the great habeas writ with the circular reasoning displayed in this case can single word dismissals of "denied" be far behind? If U.S. Attorneys are allowed to ignore 28 USC 2255 Rule 5 by not addressing a petitioner's factual allegations can the adversarial process really work? The district court proved it is not familiar enough with the facts of this case to make any kind of summary denial when it found the motel manager had seen cocaine, and then later admitted that finding was in error. The government has refused to take any position whatsoever on the facts in blatant violation of 28 USC 2255 Rule 5. Petitioner has asked the district court to order the government to provide an answer on the facts for years, yet the court repeatedly refuses to do so. The purpose

of the habeas writ has been thoroughly defeated through an abuse of the district court's discretion. Petitioner is legally entitled to an answer from the government, as well as an evidentiary hearing under the facts of this case and Petitioner asks this court to grant certiorari in the interests of substantial justice and fair play. (While this petition seeks certiorari, petitioner notes that per Rule 20.1 it could also be treated by this court as one of mandamus. The district court, and the government as sanctioned by the 8th Circuit, have refused to apply the law of this Court, the laws of Congress, and of the Due Process clause such that all three requirements of Rule 20.1 are met.)

The Court of Appeals has sanctioned a departure by the district court which has so far departed from the accepted and usual course of judicial proceedings and the laws of Congress that petitioner calls on this Court to exercise its power of supervision.

Petitioner seeks: 1.) an answer from the government in accord with 28 USC 2255 Rule 5; and 2.) an evidentiary hearing on the merits. Petitioner suggests that he will receive more justice from this Court than he has received in the past seven years below simply by this Court inviting the Solicitor General to respond to this petition, but with direction that the Solicitor General do so by specifically answering petitioner's factual allegations. Such a response will provide proof that petitioner is entitled to either an evidentiary hearing, or to conviction vacation. The court should be aware, however, that the record below lends itself easily to confusion and to being taken out of context due to there being both clear plastic bags of sugar-based white powder which were in plain view, and clear plastic bags of cocaine which were concealed from view. For example, the district court's order of 1987 cited to police officers

discussing open-topped grocery bags and clear plastic bags of white powder. Upon closer review, however, it is made clear they were talking about sugar-based substances, not cocaine. Cf. Magistrate Becker's R&R of 1989 at pp. 13-14. Consequently, any discussions of plastic bags must be clearly distinguished and any invitation to the Solicitor General should require close examination of the record so as not to cite the record incorrectly; should this Court choose to extend an invitation.

Petitioner believes it is a common practice in the district courts below to allow the government to provide an inappropriate answer to a habeas petitioner's factual allegations. The district courts then routinely make a factual finding on the record, as in this case, without any adversarial input and any further attempts by the petitioner to clarify the facts are dismissed per 28 USC

2255 Rule 9 as successive. As a former prisoner petitioner saw this happen to other prisoners beside himself. By granting certiorari this Court could send a message to all district courts below that they must enforce 28 USC 2255 Rule 5 by requiring a response from the government directly addressing a habeas petitioner's factual allegations. This petition is pro se, however, the Court should know that petitioner will hire a Bar admitted attorney to argue this case before this Court should certiorari be granted.

Respectfully;

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